

MISTAKEN IDENTIFICATION DEFENSE

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I. IMPORTANCE OF MISTAKEN IDENTIFICATION DEFENSE

- A. This defense is applicable far more often than any other defense.
- B. More people are wrongfully convicted as a result of mistaken identification than in any other way This defense is justified.
- C. It is a relatively successful defense as there is no way a prosecutor can show identification with certainty.

II. DIRECT ATTACK IS SELDOM SUCCESSFUL

Attempting to force the eyewitness identification witness to admit he is not really positive seldom works.

III. UNDERMINING

- A. Undermining is the basic idea in the successful identification defense. The idea is to “shake the faith” of the jury in the accuracy of the identification.
- B. Undermining is attacking the basis for the witness’ positive identification by showing that the process of identification was faulty and that there are danger signals which should alert one to the possibility of misidentification.
- C. To justify conviction there is need for a process which can insure beyond a reasonable doubt that this defendant out of all the world is the culprit. This calls for great precision.
- D. The need for precision and accuracy in identification can be analogized to the need for precision instruments in various technical areas.
 - 1. An altimeter which is only accurate to within 1000 feet is not good enough. The jury will understand this analogy.
 - 2. The identification in your case is not good enough because of the inaccuracy of the identification process.

IV. CHECKLIST OF “DANGER SIGNALS” WHICH UNDERMINE IDENTIFICATION AND ALERT TO THE POSSIBILITY OF MISIDENTIFICATION.

- A. There was inadequate opportunity to observe.
- B. The lighting was bad.
- C. The witness saw the culprit for only a short time.
- D. The opportunity to observe was or was mostly before the witness knew of anything unusual.
- E. The witness was scared.
- F. The witnesses compared notes.
- G. There was a considerable lapse of time between the crime and the identification procedure.
- H. The witness and the culprit were strangers.
- I. The identification evidence was bad in this case.
 - 1. Other witnesses did not identify defendant.
 - 2. Other witnesses identified someone other than defendant.
 - 3. The description of the defendant does not match the description given shortly after the crime.
- J. The description given was a vague description.
- K. The identification keeps getting stronger as time goes on.
- L. There was uncertainty about the culprit and what happened shortly after the event but certainty now.
- M. The witness went from uncertainty to certainty as a result of suggestion and reassurance.
- N. There are inconsistencies between testimony and physical facts, between the testimony of various witnesses and within the testimony of the identification witnesses showing they can be wrong.

- O. There were a number of “things not done” in the investigation process.
- P. Evidence supports (even if it does not prove) conclusion that someone else did it.
- Q. No circumstantial evidence shows defendant did it and likely would if he were the culprit.
- R. Nothing was found in a search of the defendant’s home, automobile, etc., which ties to the robbery.
- S. Witness remembers only one feature of the culprit which compares to the defendant – hair, size, etc.
- T. Witness does not remember details of other features such as mustache, nose, mouth, color of skin, etc.
- U. Witness made remarks to police during identification process which shows uncertainty.

V. WHAT REALLY HAPPENS IN IDENTIFICATION CASES UNDERMINES THE IDENTIFICATION WHEN BROUGHT HOME TO THE JURY.

- A. The witness goes from uncertainty as to identification right after the incident to certainty at the trial.
 - 1. Look for evidence of uncertainty right after the event.
 - a. The witness tells the detective he is not sure he could identify the culprit.
 - b. The description is vague.
 - c. If there is a photo display, the witness hesitates at the defendant’s picture and then looks at the others before deciding on the defendant.
 - d. If the witness immediately picks the defendant, he may be jumping to a conclusion.
 - e. The witness studies the photo after making the photo identification.
 - f. If there is a lineup, the witness does not mark the card or otherwise identify the defendant until well into the procedure.
 - (1) The witness may say he just “wanted to be sure,” but this remark tells us he was not sure and the hesitation is evidence, once again, of uncertainty.

g. The remarks made in identifying the defendant in the photo display or lineup may be words of certainty.

(1) Anything other than an absolutely positive remark contains uncertainty and the attorney must find it.

(2) “This looks like him,” for example, shows uncertainty. One does not say, “looks like him” if one is certain, and says it only if uncertain.

B. The witness goes from uncertainty to certainty with the passage of time because of suggestion and reassurance involved in the police and criminal justice system.

1. When the detective is talking to the eyewitness right after the incident, the eyewitness almost always asks when he will hear further about the case. The detective (not wanting to be bothered by phone calls from the victim) will say something like, “We’ll be in touch with you when there is a break in the case.”

2. A few days later the detective calls and wants the identification witness to look at some photographs.

3. The witness jumps to the conclusion that this must be that “break in the case” and expects the culprit’s photo to be among those shown.

a. The witness will almost always admit the conversation where the detective said he would be in touch when there is a break in the case.

b. The witness will almost always admit he expected to see the real robber, etc., among the pictures if your question is worded, “Mr. Jones, I suppose it was only natural that you expected to see the real robber among the pictures?”

c. Note the effect of this process is to exclude all the world except those in the photos and suggest that it is one of them.

d. The witness is thus only picking the one out of the photos which looks most like the culprit making the process very imprecise and inaccurate.

4. When the witness picks a photo, the detective will have the witness sign and date on the back or at the side of the photo and the detective will do likewise.

a. Witnesses unconsciously look to the detective as an authority figure who knows who did it without realizing that the detective was not present when the crime occurred.

b. As a result the witness looks upon the process as one where the detective knows and the witness is just trying to pick the right card.

c. Detectives sometimes say, “We are bringing some pictures and we want to see if you can pick someone out.”

d. Thus, you get a “yes” to the question, “Mr. Jones, when the detective had you sign and date the photo and he did the same, it’s a fair statement, isn’t it, that you were reassured that you had picked the right man”?

5. The detective then may ask, “Do you think you could pick him out of a lineup?”

a. More reassurance. The detective would not have asked the question if the witness had picked the wrong person.

b. Many times the witness’ answer indicates uncertainty -- “I think so.”

6. At the lineup, defendant is, of course, the only one from the pictures who is also in the lineup, (more suggestion and reassurance.)

a. After the lineup the detective tells the witness that charges will be filed (more suggestion and reassurance.)

b. The witness is later called to sign the complaint (more suggestion and reassurance). The witness feels he would have been stopped long ago if wrong, so he must be right.

7. The case goes to trial.

a. The witness can never believe the police would go this far if he had been wrong, so he is positive on the stand before the jury.

C. It is difficult to imagine a more subtle but effective and insidious process than this one of suggestion and reassurance.

1. Beg the jury to go back right after the incident when the witness was uncertain in deciding how positive the identification is.

2. Take the jury through the process. They will understand.

VI. USE THE IDENTIFICATION SUPPRESSION HEARING TO SET UP ALL THE ABOVE

A. Ask the questions in the hearing.

1. If the answer is favorable you have a nugget to use before the jury. The witness must answer the same way or be impeached.
2. If the answer is unfavorable, no harm results.

VII. THE “HICKEY” DEFENSE

- A. Rests on the idea that the defendant has some mark, scar, prominent feature, tattoo, etc., -- which would have been noticed by a witness observing as carefully as the witness testified he did -- and it was not noticed.
- B. In every identification case, be sure to examine for such marks.
- C. Get the witness to say that the light was great, that he observed carefully, he did not see anything unusual.
- D. Get the evidence of the mark, feature, etc., before the jury and the argument is set that the culprit could not have been the defendant or the identifying feature would have been noticed. The culprit had to be someone without that feature.
 1. Recognize that much of this defense is inconsistent with the ordinary identification defense and usually you need to choose between the alternatives.

VIII. ALIBI

- A. It is an effective defense if the witnesses are impartial and there is some specific reason for remembering the time involved.
- B. Corroborate the alibi testimony in any way possible.
- C. Alibis are often suspect because the alibi witnesses are usually girl friends, mothers, wives, etc.
 1. One should hesitate to use an alibi when it will be ineffective as it will affect the credibility of the rest of the case.

IX. THE “VAGUE DESCRIPTION” CROSS-EXAMINATION

- A. The idea is to get the witness to say that he, the witness, gave the best description he could -- otherwise shown to be most vague.
 1. Get the witness to say:

- a. He was unhappy with being robbed.
- b. He wanted to help the police.
- c. The police asked for a description
- d. He told them everything he could.
- e. They gave him plenty of time.

B. The argument on closing, of course, is that the witness' observation and recollection could not have been good if a vague description was all he could give them at the time.

X. THE USE OF INCONSISTENCIES

A. Gather several significant inconsistencies from the eyewitness identification witness.

B. The argument on closing is:

“The prosecution’s entire case depends on Mr. Jones and Mr. Jones’ being right when he pointed to [the defendant] and said he was the man. Let’s look at whether we can depend that much on Mr. Jones’ being right. As to [Point 1] he said A to the police and B at the preliminary hearing. He was wrong, wasn’t he, one time or the other. As to [Point 2] he said C at the previous hearing, and D on direct examination and E on cross-examination. He was wrong, wasn’t he on at least two of those occasions... If you base your verdict on his testimony and it turns out that he was wrong when he pointed to [the defendant] as he has been wrong so often before, then your verdict will be wrong and you will have convicted an innocent man.”

XI. CLOSING ARGUMENT POINTS

A. The only issue is whether this young man and no one else in this world was the one who...

B. Say, “The evidence shows he was not the one.”

C. Don’t say, “The evidence creates a reasonable doubt.”

D. Identification evidence is hazardous evidence.

E. The Court describes the care you need to exercise in Instruction No. ____.

F. That it is bad evidence was demonstrated in this case when two witnesses were present. A lineup was held. One witness said it was the defendant. The other witness did not even say No. 3 looked like the robber.

G. How did it happen? Through a process of suggestion and reassurance.

H. Having Mr. Jones identify the defendant is simply not a process of precision and accuracy. The evidence proves that.

I. The prosecution's own evidence proves it could not have been the defendant. The one who did it was 6'2" and 180 pounds. It therefore could not have been the defendant who is 5'10 and 145 pounds.